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In the

Supreme Court of the United States

October Term, 1941.

H. J. GORMAN, City Treasurer of Kansas City, Missouri, and FRANK McCABE, City Assessor of Kansas City, Missouri, *Petitioners*,

vs.

THE WASHINGTON UNIVERSITY, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

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INDEX.

	PAGE
Petition for certiorari	1
Summary and short statement of the matters involved	2
Jurisdiction	7
Questions presented	7
Reason for granting the writ	8
Brief in support of petition for writ of certiorari	13
I. Opinion of the Supreme Court	13
II. Jurisdiction	13
III. Statement of the case	13
IV. Specifications of errors	14
V. Argument	15
Conclusion	21

Cases Cited.

Erie v. Tompkins, 304 U. S. 64 ..... 5, 7, 8, 14, 16

Erie Railroad v. Tompkins, 304 U. S. 74 13

North Central Railway v. Maryland, 187 U. S. 258, l. c. 267 20

Phillips Exeter Academy v. Exeter, 11 Atl. (2d) 569 ..... 11, 17

Ruhlin et al. v. N. Y. Life Ins. Co., 304 U. S. 202 ..... 9, 15

State ex rel. Ziegenhein v. Missouri Free School, 162 Mo. 382, 62 S. W. 998 22

Swift v. Tyson, 16 Peters 1 ..... 5, 7, 16

The City of St. Joseph v. Hannibal & St. Joseph R. R. Co., 39 Mo. 476 ..... 4, 19

PAGE

Washington University v. Rowse, 42 Mo. 308....3, 7, 9, 16, 19
Washington University v. Rowse, 49 Mo. 308.....5
Washington University v. Rowse, 75 U. S. 439.....
.....4, 7, 13, 14, 15, 18, 19

Statutes Cited.

Constitution of 1820, Art. III, Sec. 2.....20

Constitution of 1820, Art. XIII, Sec. 2.....14

Constitution of 1865, Art IV, Sec. 25.....14

Constitution of 1875, Art. X, Secs. 6 and 7.....11, 14, 21

Constitution of the United States, Sec. 10, Art. I.....16

Federal Constitution, Art. X, Sec. 2.....20

Judicial Code, Sec. 237(b), as amended by Act of Feb. 13, 1925, Chap. 229, 43 Stat. 936, 937 (28 U. S. C. A., Sec. 344).....7, 8, 13

Revised Statutes of Missouri 1845, Chap. 34, Art. I, Sec. 7.....20

Revised Statutes of Missouri 1879.....11

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H. J. GORMAN, City Treasurer of Kansas City, Missouri, and FRANK McCABE, City Assessor of Kansas City, Missouri, *Petitioners,*

vs.

THE WASHINGTON UNIVERSITY, *Respondent.*

No. ———.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

Your petitioners, H. J. Gorman, city treasurer of Kansas City, Missouri, and Frank McCabe, city assessor of Kansas City, Missouri, respectfully petition this Court to grant a writ of certiorari to the Supreme Court of the State of Missouri, and to remove therefrom to this Court, for review, the record of the case therein lately pending of The Washington University, Respondent, v. H. J. Gorman, City Treasurer of Kansas City, Missouri,

and Frank McCabe, City Assessor of Kansas City, Missouri, Appellants, being case No. 37,435, on the docket of that court.

Summary and Short Statement of the Matters Involved.

This was a suit brought by respondent, Washington University of St. Louis, Missouri, to enjoin petitioners, the Treasurer and the Assessor of Kansas City, Missouri, from levying and collecting certain real estate taxes on property located in Kansas City, Missouri. Respondent University relied upon a charter granted to it by the legislature of the State of Missouri in 1853, and particularly upon that portion of the charter which provides: "all property of said corporation shall be exempt from taxation and the sixth, seventh, and eighth sections of the first articles of the Act concerning corporations, approved March 19, 1845, shall not apply to this corporation"*1 (R. pp. 136-137). The Charter, in the nature of an act of incorporation, also provided that the purpose of the corporation was educational. At the time this Charter was granted, the Constitution of Missouri of 1820 was then in effect, and provided in Article XIII, Section 2 (R. p. 57): "* * * that the people of this state have the inherent, sole and exclusive right of regulating the internal government and police thereof, and of altering and abolishing their Constitution and form of government whenever may be necessary to their safety and happiness." Acting under that charter, respondent University began operation.

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*1—The pertinent part of the sections referred to provides:
"The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension or repeal in the discretion of the legislature." (Chapter 34, Article I, Sec. 7, R. S. Mo. 1845.) (R. p. 54.)

On July 4, 1865, long before respondent University acquired any property in Kansas City, Missouri, the people of Missouri adopted a new Constitution which provided in Article IV, Section 25, that the General Assembly should not pass special laws exempting any property of any named person or corporation from taxation (R. p. 58). Pursuant to this provision the legislature provided for the taxation of all property belonging to eleemosynary corporations except that expressly exempt from taxation by the constitutional provisions (R. p. 16). The taxed property in question was not within this exemption.

In 1866, Rowse, the collector of revenue of St. Louis County, assessed taxes against the property of the University in St. Louis County. The University enjoined the collection of these taxes on the grounds that its charter was an irrevocable contract exempting its property from taxation forever. The Supreme Court of the State of Missouri held (*Washington University* v. *Rowse*, 42 Mo. 308) that the charter provision did not impose a contractual obligation upon the state, and that at the most it was a revocable privilege * * * that, therefore, St. Louis could tax the real property of respondent, Washington University.*2 The Missouri Supreme Court specifically ruled that there was nothing in the transaction

*2—*Washington University* v. *Rowse*, 42 Mo. 308, l. c. 316:
"The charter is unusual and of marked peculiarity. There is no preamble to the act, and no limit to its duration or to the amount of property which it may hold. No obligations are cast upon the corporation; it stipulates for nothing, and agrees to give no consideration whatever for the extraordinary privileges thus granted. The intention was, we suppose, to establish an institution of learning, but there is nothing to prevent the corporation from accumulating and absorbing millions of wealth, and there is no corresponding obligation imposed to compel it to carry out any contemplated object."
And again, at l. c. 319, the Missouri Supreme Court held:
"An act, without any consideration passing between the parties, providing that lands never should be taxed, would have only the force and effect of an ordinary law simply exempting them from taxation, which might be repealed by any subsequent Legislature."

that amounted to consideration, an essential of every contract. This was but a reannouncement of the doctrine of an earlier Missouri Supreme Court case, *The City of St. Joseph* v. *Hannibal & St. Joseph R. R. Co.*, 39 Mo. 476, that the consideration for the grant must be expressly included in the grant of exemption. Respondent University appealed from this decision to the United States Supreme Court on the ground that its Charter constituted a contract with the State of Missouri and that it was protected under Article I, Section 10, of the Constitution of the United States against this alleged impairment of its contract by the State of Missouri. The United States Supreme Court upheld this contention of rspondent University in a four to three decision a*Washington University* v. *Rowse*, 75 U. S. 439) and declared that Article IV, Section 25, of the Missouri Constitution of 1865 was invalid as in violation of said Federal constitutional provision. A strong dissenting opinion by Mr. Justice Miller, concurred in by Chief Justice Chase and Mr. Jusice Field, on principle sustained the right of St. Louis to tax respondent's property situated in St. Louis, Missouri.*3 Mr. Justice Miller there stated, l. c. 444:

> "We are strengthened in this view of the subject, by the fact that a series of dissents, from this doctrine, by some of our predecessors, shows that it

*3—*Washington University* v. *Rowse*, 75 U. S. 439, l. c. 443:
"We do not believe that any legislative body, sitting under a State constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the State. This is a power which, in modern political societies, is absolutely necessary to the continued existence of every such society. While under such forms of government, the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal service from their subjects, no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful."

has never received the full assent of this Court; and referring to these dissents for a more elaborate defense of our views, we content ourselves with thus renewing the protest against a doctrine which we think must finally be abandoned."

The majority opinion was premised upon the then rule of the United States Supreme Court that there was a federal common law, as then established by the case of *Swift* v. *Tyson*, 16 Peters 1, and which since has been recently overruled by *Erie* v. *Tompkins*, 304 U. S. 64. Premised upon the now overruled Swift case, this Court held by its four to three majority, first: that the United States Supreme Court would, independent of any state decision, *and without regard to the then settled law of this state*, decide whether or not there was consideration present in the transaction wherein respondent University received its charter from the State of Missouri through its legislature; and secondly: that under the here stated circumstances the State of Missouri had contracted away forever its inherent power of taxation so far as any property owned by respondent was concerned. That Court then reversed the opinion of the Missouri Supreme Court and ordered it to act in accordance with its overruling opinion. Petitioner asserts that the decision of the case of *Washington University* v. *Rowse*, 49 Mo. 308, so overruled, was the last expression of the independent judgment of the Missouri Supreme Court in regard to the force and the effect this claimed charter exemption as a contract.[*4]

[*4] See opinion of Missouri Supreme Court in instant case (*Washington University* v. *H. J. Gorman et al.*, decided January, 1941, and not yet reported (Record p. 177), wherein the Court said:

"There can be no question but that the decision of the United States Supreme Court in the University's case against Rowse is today the law and is commandingly decisive of this case. We *must* abide by it now as we did in *Washington University* v. *Baumann*." (Emphasis ours.)

On October 30, 1875, the people of Missouri again adopted a new Constitution (still in effect) which provided, among other things, that "all laws exempting property from taxation, other than the property above enumerated, shall be void (Article X, Section 7, Constitution of Missouri) (R. p. 11). It is admitted by respondent that its property here in question does not come within the exemption to the above constitutional provision[*5] prohibiting tax exemptions. Also by general statute the Missouri legislature in pursuance of the above constitutional provision designated certain class exemptions, which exemptions respondent concedes do not apply to it.

At present respondent University owns a vast amount of income producing real estate (which property is not devoted directly to educational use). In recent years, and long subsequent to 1875, respondent has acquired much real estate located in Kansas City, Missouri. By virtue of respondent's contention that the constitutional and statutory provisions of the State of Missouri above set out, as applied to it are null and void, as being contrary to and in violation of Section 10 of Article I of the Constitution of the United States, it has attempted to withdraw forever that property from the tax rolls of petitioner, and also any other property it may acquire in the future in Kansas City, Missouri.

[*5]—Article X (Missouri Constitution):

"Sec. 6—*Property exempt from taxation.* The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, also, such property, real or personal, as may be used exclusively for agriculture or horticultural societies: *Provided*, that such exemption shall be only by general law.

"Sec. 7—*Other exemptions void.* All laws exempting property from taxation, other than the property above enumerated, shall be void."

Jurisdiction.

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936, 937; 28 U. S. C. A., Section 344.

Questions Presented.

Two questions are presented, each independent of the other.

First Question: Whether or not the case of *Washington University* v. *Rowse*, 75 U. S. 439, premised, petitioner's believe, upon the rule of *Swift* v. *Tyson*, 16 Peters 1, and now overruled by *Erie* v. *Tompkins*, 304 U. S. 64, still absolutely prohibits the Supreme Court of the State of Missouri from following the settled law of the State of Missouri that there is no consideration in the charter granted by the State to respondent University as announced in its last independent opinion (*Washington University* v. *Rowse*, 42 Mo. 308), and whether the former Rowse decision still forces the Supreme Court of Missouri to follow the general federal common law upon that subject as decided by the United States Supreme Court in 1867 in a four to three decision, and premised, petitioners believe, upon the *Swift* v. *Tyson* doctrine recently abandoned by this Court. That is, is the Missouri Supreme Court still forced to follow the federal common law as to what is consideration, even though *Erie* v. *Tompkins* declares that the federal courts must follow the state law?

Second Question: Even if the first question should be determined contrary to petitioner's earnest conception of the effect of the newly decided *Erie* v. *Tompkins* case,

this Court should determine whether or not the ancient federal decision in the Rowse case that there was consideration (decided in 1867 in a four to three opinion, and whose strong dissent pointed out the weakness and error of the majority opinion, and stated that it was a doctrine long dissented from and one that must be finally abandoned by this Court) present in the transaction whereby Washington University received its charter from the Missouri legislature should still be the law so as to invalidate Article X, Sections 6 and 7, of the Constitution of Missouri of 1875.

Reason for Granting the Writ.

The discretionary power of this Court to grant a writ of certiorari (under Section 237b of the Judicial Code) is urged and invoked upon the following grounds and for the following reasons:

First: The decision of the Supreme Court of Missouri gives an erroneous interpretation to the effect of this Court's recent decision in the case of *Erie* v. *Tompkins*, 304 U. S. 64, in this:

The Erie case holds, in effect, that there is no federal common law and that the Supreme Court of the United States is now bound by *either* the statutes of the state or the law of the state as announced by the decisions of its highest courts. The Erie case excepts matters affecting violations of the federal constitutional provision prohibiting the impairment of contracts, holding that this Court must decide for itself whether or not there has been an impairment of a contract. However, in determining whether or not there is a contract, this Court, under the Erie decision, is bound by the decision of the Supreme Court of the state as to what are the constituent

elements of a contract, as here, what are the elements constituting legal consideration so as to make a binding contract. If the state courts' decision on this is not wholly arbitrary and not wholly without reason, this Court must accept it. The determination as to the existence of a contract must be made in the light of the law of the state involved. Yet in the Rowse case, decided over 70 years ago, in order to find the element of consideration essential to an enforceable contract resort was had to a "federal common law" rule of construction by which consideration was *presumed* from the mere enactment of the legislation with a purpose declared to be beneficial to the state.

This federal ruling, originally announced in the Dartmouth College case, was contrary to the well-settled law of this state as last declared by the Missouri Supreme Court in *Washington University* v. *Rowse*, 42 Mo. 308. Since it was upon the theory of *Swift* v. *Tyson* that the settled law of the Supreme Court of Missouri was rejected by the four to three opinion of the Federal Supreme Court, and since *Erie* v. *Tompkins* has held that there is no such thing as a federal common law, and the Federal Courts are required to apply the laws of the state where the cause of action arose (recognized also by the case of *Ruhlin et al.* v. *N. Y. Life Ins. Co.*, 304 U. S. 202), the Rowse decision should be declared to be no longer binding upon the Missouri Supreme Court.

Second: Under its repeatedly announced right to correct an erroneous decision, this Court should review and correct the doctrine announced in the original Rowse case, decided by this Court in a four to three decision, over 70 years ago, under entirely different circumstances from those now obtaining. This Rowse decision, which held unconstitutional Article IV, Section 25, of the Con-

stitution of Missouri of 1865, and a statute of this state passed in conformity therewith, did so on a doctrine that has always been strongly dissented from as one which must be finally abandoned on its merits. As stated by Mr. Justice Miller and concurred in by Chief Justice Chase and Mr. Justice Field, in the dissent in that case, the following basically compelling reasoning calls for a reversal of the majority opinion:

> "We do not believe that any legislative body, sitting under a State constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the State. This is a power which, in modern political societies, is absolutely necessary to the continued existence of every such society. While under such forms of government, the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal service from their subjects, no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful."

In addition to the above set out reasons for the reversal of the Rowse case, we wish to point out that at the time the Rowse case was presented to this Court there was a failure on part of counsel to present to this Court for consideration Article XIII, Sec. 2, of the Missouri Constitution, in effect when respondent's Charter was granted, and providing that the people of the State of Missouri had the inherent and sole right to regulate the internal government and to alter and abolish their Constitution whenever necessary to their safety and happiness.

Since the Rowse case, there has been a growing tendency on the part of this Court to accept the decision of the highest court of the state upon this type of question where it cannot be said that its decision was in itself unreasonable or in violation of the plain language of a federal statute or the federal Constitution.*6 This trend culminated in the Erie decision. Since the Rowse decision by this Court, Missouri has again changed her Constitution and her laws so as to in both instances declare respondent University's property now to be subject to taxation (Constitution of 1875, Article X, Sections 6 and 7) (R. p. 11) Section 9742, Revised Statutes of Missouri 1879 (R. p. 12). In view of the expressed changed opinion of this Court and in view of the fact that Missouri has by a new Constitution sought to tax this property, this Court should entertain this case on its merits and rule that this property is subject to taxation. In the original Rowse decision this Court refused to give any weight to the then settled law of Missouri as announced by its highest state court.

Third: The Erie case and the Ruhlin case have been erroneously interpreted by the Supreme Court of Missouri and thus has left in confusion an important and far-reaching question of federal law. The only other state to have passed upon this question in the short time since the Erie case is the State of New Hampshire. That state, through its highest court, in the case of *Phillips Exeter*

*6—See *Chicago Theological Seminary* v. *Illinois*, 188 U. S. 662, wherein Mr. Justice Peckham declared, l. c. 64, 65:

"* * * Great weight ought also be attached to the decision of a state court regarding questions of taxation or exemption therefrom under the Constitution or laws of its own state. * * * The decision of the state court is entitled to exercise marked influence upon the question this court is called upon to decide and where it cannot be said that the decision is in itself unreasonable or in violation of the plain language of the statute, we ought, in cases engendering a fair doubt, to follow the state court in its interpretation of the statutes of its own state." To same effect see also *Wilson* v. *Standiffer*, 184 U. S. 399, 412; *Millsaps College* v. *City of Jackson*, 275 U. S. 129."

Academy v. *Exeter*, 11 Atl. (2d) 569, held exactly contrary to the Missouri Supreme Court in the instant decision.*B This clearly reveals the existing confusion on this all-important federal question.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued to the Supreme Court of the State of Missouri to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Supreme Court of the State of Missouri be reversed; all based on the grounds and reasons hereinbefore recited.

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*B—"The court reviewed prior decision in the State of New Hampshire on the questions involved and determined that it was beyond the power of the Legislature to grant a perpetual exemption from taxation and that therefore the provision purporting to grant such an exemption was at most a grant of revocable privileges. The decision commented upon the effect of the doctrine of the Erie Railroad case, *supra*, as follows, l. c. 579:

"'The federal constitution requires no enforcement of invalid contracts and the states, and not the nation, now determine between valid and invalid contracts. Upon the issue of construction of state legislation, the state's own common law now controls, even when federal jurisdiction may be asserted in passing upon it. The theory of a common law of the nation, adopted in *Swift* v. *Tyson*, 16 Pet. 1, 18, 10 L. Ed. 865, has been abandoned by the case of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487. The federal courts now follow a state's own judicial construction of all its laws not involving federal authority. Decision of the validity of the plaintiff's exemption as irrevocable is therefore to be reached by determination of the local law.'

"And again, l. c. 584:

"'Throughout the course of judicial thought in the state, doubts and disapproval of any alienation of the taxing power have been expressed, a natural reluctance to guide the future in view of the serious effect on accrued situations may partly explain the avoidance of definite statement. But the chief reason is the federal rule adopting a mythical common law of the nation in place of local law, which operated to blockade decision of the local law. The rule being no longer extant, state courts may now apply their own law and the federal courts will employ it as controlling.'"

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Supreme Court.

The judgment of the Supreme Court of Missouri and the opinion of that Court, both stating that the Supreme Court of Missouri is still bound by the 73-year-old case of *Washington University* v. *Rowse*, 75 U. S. 439, and misinterpreting the effect of this Court's decision in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 74, appears in the record at pages 172-183, inclusive. This opinion is not yet officially reported.

II.

Jurisdiction.

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari, under Section 237b of the Judicial Code as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 936, 937; 28 U. S. C. A. Sec. 344. The date of the application for the writ may be taken as the date of the filing of the petition in the office of the clerk of this Court.

III.

Statement of the Case.

A statement of the case is set forth in the foregoing petition under the caption "Summary and short statement of the matters involved," to which reference is hereby made.

IV.

Specifications of Error.

1. The Supreme Court of Missouri erred in holding that it was absolutely bound by and must conform to the opinion of this Court in *Washington University* v. *Rowse*, 75 U. S. 439.

2. The Supreme Court of Missouri erred in its interpretation of *Erie Railroad* v. *Tompkins*, 304 U. S. 64, in that it held that that case does not allow to the Supreme Court of Missouri the right to determine the question of whether or not a certain transaction contained all of the elements of a contract so as to bind the parties thereto.

3. The Supreme Court of Missouri erred in affirming the judgment of the trial court in enjoining and restraining petitioners herein from assessing any general city taxes against any of the respondent's property, for the reason that the people of Missouri, through both their Constitutions of 1820, Article XIII, Sec. 2 (R. p. 63), and of 1865, Article IV, Sec. 25 (R. p. 58), have caused respondent's land to be subject to taxation by petitioners, and the Supreme Court of Missouri, by misinterpreting this Court's decision in both *Washington University* v. *Rowse* and *Erie Railroad Co.* v. *Tompkins* has ruled that this Court has given to the transaction described in the petition herein, the qualities of an irrevocable and perpetual contract protected by the Federal Constitution, Article I, Sec. 10.

4. The Supreme Court of Missouri has erred in holding that Secs. 6 and 7, of Article X, of the Constitution of 1875 does not cause respondent's property to be subject to taxation by petitioner, for the reason that the Missouri Supreme Court has held that it is bound by the opinion of this Court in *Washington University* v. *Rowse*,

decided in 1867, even though the doctrine of that case has been specifically repudiated by both the cases of *Erie Railroad Co.* v. *Tompkins, supra,* and *Ruhlin et al.* v. *New York Life Ins. Co.,* 304 U. S. 202.

5. Lastly, the opinion of the Supreme Court of Missouri is directly contrary to and in conflict with the decisions of this Court in *Erie Railroad Co.* v. *Tompkins, supra,* and *Ruhlin et al.* v. *New York Life Ins. Co., supra,* and, last, the Supreme Court of Missouri has erred in holding that it is bound by the case of *Washington University* v. *Rowse, supra,* and in ruling that it does not have the right to determine this cause as of this time, upon its merits.

V.

Argument.

The Missouri Supreme Court has in its decision of this case erroneously failed to recognize the effect of the decision of this Court in the case of *Erie Railroad Company v. Tompkins.*

The four to three decision of this Court in the case of *Washington University* v. *Rowse,* 75 U. S. 439, is cited in the opinion of the Missouri Supreme Court and declared to be "the law," and "commandingly decisive of this case" (R. p. 177). The state court is of the opinion that it still cannot, in the face of the majority opinion of this Court in the Rowse case, *supra,* declare as a matter of substantive law, whether or not there was any legal consideration for the grant of tax exemption which was bestowed upon the university in 1853 by the Missouri State Legislature.

The history of this special tax exemption enactment by the Missouri Legislature, presents, in the light of sub-

sequent amendments of the Constitution of the State of Missouri a graphic illustration of the evil and disastrous effect of a doctrine announced in *Swift* v. *Tyson*, 16 Peters 1, which doctrine this Court has recently renounced in the case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64. In *Washington University* v. *Rowse*, *supra*, decided seventy years ago, four of the seven members of the United States Supreme Court, acting in harmony with the doctrine of *Swift* v. *Tyson*, *supra*, applied a rule of the "mythical" Federal Common Law by which consideration for the grant of tax exemption was presumed from the mere enactment of the legislation with a purpose declared to be beneficial to the state. This majority opinion reversed outright a decision by the Supreme Court of Missouri (*Washington University* v. *Rowse*, 42 Mo. 308) which declared, as a matter of state law, that there was no consideration for this grant and that it was, at most, a revocable privilege. The settled law of this state in regard to what constitutes consideraion for a binding contract was thus replaced by presumption in conformity with what was then a rule of the Federal Common Law.

We readily acknowledge the principle that this Court will, in cases in which the protection of Section 10 of Article I of the Constitution of the United States is invoked, form its own judgment as to the existence and construction of the alleged contract. It is, however, our contention that, since the recent decision of this Court in *Erie Railroad Co.* v. *Tompkins*, *supra*, this judgment will be based upon the law of the state as declared by its highest court as to what constitutes the various constituent elements of a contract. The "Federal Common Law" has been abolished and the Supreme Court of Missouri is therefore no longer obliged to recognize as

binding, a decision of this Court which was based upon the "Federal Common Law."

This phase of the effect of the Erie Railroad Company case has never before been presented to this Court. There is only one reported case in which the identical question herein involved has been passed upon by a state court (*Phillips Exeter Academy* v. *Exeter*, 11 Atl. [2d] 569). In this case the Supreme Court of the State of New Hampshire held that the question of whether or not there was consideration for a grant of tax exemption by a state legislature to a private educational institution, was for the determination of the state court. This decision, in its result at least, does, in our opinion, correctly determine the effect of *Erie Railroad Company* v. *Tompkins*, upon the state court's power and right to disregard the decision of this Court in the Rowse case, *supra*, and to re-examine and determine for itself, the identical issue now raised in the case at bar. The Supreme Court of Missouri has, however, held to the contrary. This conflict can be resolved only by the opinion of this Court. The matters involved in this case are of extreme importance to the people of the State of Missouri. The contention of the University that all of its property, whenever acquired and whatever its use, is perpetually free from taxation, would, if sustained, abridge the power to tax which is inherent in the people of the state. The basis for this contention, therefore, merits the closest scrutiny of this Court.

II.

The majority opinion in the case of *Washington University* v. *Rowse*, (75 U. S. 439) is erroneous and should be reversed by this Court.

In the event that this Court should not sustain the contention which we have made in Point I of this brief, we urge the Court to re-examine the majority opinion in the case of *Washington University* v. *Rowse* (75 U. S. 439). The Supreme Court of Missouri, on the theory that it was bound to follow the decision of the United States Supreme Court in the Rowse case, refused to consider the contentions which we presented to that court which go directly to the merits of this controversy. Unless, therefore, this Court will re-examine the Rowse case and consider this cause on its merits, the petitioners will be denied the right to have these matters adjudicated. This Court has repeatedly declared that it reserved the right to correct an erroneous decision. We again call the Court's attention to the dissenting opinion of Mr. Justice Miller, in the Rowse case, in which it was predicted that the majority opinion would some day be overruled (quoted at p. 4 of the petition herein). We are confident that, upon a re-examination of the principles involved, this prediction of Mr. Justice Miller will be fulfilled. The reasons we consider the majority opinion of this Court in the Rowse case erroneous are, briefly, as follows:

1. The Charter granted to the University in 1853 was not a contract. It was a grant of privileges which could be withdrawn by the Legislature or by the people of this state. There was no legal consideration for the grant and, therefore, there was no contract which could be impaired. The constitutional provisions of 1865 (R. p. 58) and of 1875 (R. p. 11) effectively withdrew the grant of tax

exemption and rendered all property held by the University subject to taxation. This was the settled law of the State of Missouri prior to the decision of *this* Court in the Rowse case (*Washington University* v. *Rowse*, 42 Mo. 308, and *City of St. Joseph* v. *Hannibal & St. Joseph Railroad Company*, 39 Mo. 476), and this is the law of New Hampshire as held in the recent decision of the Supreme Court of that state in the case of *Phillips Exeter Academy* v. *Exeter*, *supra*.

2. It was beyond the power of the Legislature to grant a perpetual exemption from taxation. The power to tax is inherent in a sovereign state and, therefore, the legislature of 1853 representing possibly the then current popular will could not lawfully abridge this power by granting a perpetual exemption from taxation. In a democratic government, sovereignty and all of its attributes, including the power of taxation, is vested in the people of the state. It is inconsistent with these fundamental principles to hold that any one of the biennial state legislatures may deprive all succeeding generations of the power to tax certain property. (See quotation from opinion in *Washington University* v. *Rowse*, 42 Mo. 308, at p. 3 of petition herein, and *Washington University* v. *Rowse*, 75 U. S. 439, quoted at p. 4 of petition herein.)

In addition to the above contentions which were presented to this Court in the Rowse case, we submit the following propositions which were not urged in the Rowse case in either the Missouri Supreme Court or in this Court:

1. Assuming for the purpose of argument only that the Charter grant of tax exemption was a contract, it is fundamental that constitutional provisions, and provisions of the general law, which were in force at the time of

the grant must be considered part of the contract. The Constitution of 1820, Article III, Section 2, provided:

> "That the people of this state have the inherent, sole and exclusive right of regulating the internal government and police thereof, and of altering and abolishing their constitution and form of government whenever it may be necessary to their safety and happiness."

The contract, therefore, was entered into subject to the reserved right of the people of the State of Missouri to change their constitution. This right was exercised by the people of the State of Missouri in 1865 and again in 1875. The constitutional provisions then adopted had the effect of repealing the tax exemption of the university.

Chapter 34 of the Revised Statutes of Missouri, 1845, provided, Article I, Section 7 (R. p. 54):

> "The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature."

This reserved right was exercised by the legislature in enacting the taxing statutes which were involved in the case of *Washington University* v. *Rowse, supra.* The statutory provisions above quoted must also be considered a part of the contract and removes from the contract the element of irrevocability which is necessary before a contract is protected by Article X of Section 2 of the Federal Constitution. *Northern Central Railway* v. *Maryland,* 187 U. S. 258, l. c. 267:

> "In considering this question it will be borne in mind that it is elementary that where the constitution of a State reserves the right to repeal, alter or

> amend, all charters granted by the legislature are subject to such provision, and therefore are wanting in that attribute of irrevocability which is essential to bring them within the intendment of the clause of the Constitution of the United States protecting contracts from impairment. The cases supporting this doctrine are so numerous that they need not be cited."

That the effort upon the part of the legislature of 1853 to except the university charter from the operation of the section of the general law above quoted was invalid was decided by the Missouri Supreme Court in the case of *Washington University* v. *Rowse*, in which it was said, l. c. 325:

> "No importance or weight can be attached to that provision of the charter of defendant in error which excludes it from the operation of the 7th section of the general law in relation to corporations."

These two provisions, one constitutional and the other statutory, had the effect of reserving to the people and to the legislature, the power to alter or repeal the charter of the university.

2. It is our contention that Sections 6 and 7 of Article X of the Constitution of the State of Missouri of 1875, had the effect of repealing the charter exemption from taxation as to *all property acquired by the university after the effective date of this constitution*. (These two sections are set out in full at p. 6 of the petition herein.) This constitution was adopted after the decision of this Court in the Rowse case for the obvious purpose of curtailing the further acquisition of property and the holding of such property free from taxation by Washington University and other corporations who had theretofore ob-

tained charter exemptions from taxation from the legislature of the state. That such was the purpose of the framers of this constitution was recognized by the Supreme Court of Missouri in the case of *State ex rel. Ziegenhein* v. *Missouri Free School*, 162 Mo. 382, 62 S. W. 998.

The record in this case (pages 150, 151, 152) discloses that the property in controversy was acquired by the University long after the adoption of the Constitution in 1875. The University had no vested right in the exemption of this property from taxation. The determination of the people of the State of Missouri, as disclosed by these constitutional provisions, to put a stop to the further withdrawal of property from the tax rolls of the state and its municipalities, should be permitted to have the intended effect. The most solemn and binding manner by which the will of the people of a sovereign state may be expressed, is by and through their constitution, and their obvious intent as disclosed by this instrument cannot be disregarded.

Conclusion.

In conclusion, we wish to call the court's attention to the situation which has resulted from the continuation of the alleged tax exemption of the University. There is no limitation placed upon the amount of property which may be withdrawn from taxation by the University. The purpose of the granting of tax exemption has been served. It is conceded that the University is now a tremendously wealthy institution. It is the owner of many millions of dollars worth of revenue producing property and is certainly capable of bearing its fair share of the tax burden of the state and its municipalities. Other colleges and

universities in this state are carrying their share of the tax burden on land held by them solely for revenue purposes. The record discloses, for example, that St. Louis University, located in the same city as respondent, became the co-owner of real estate in Kansas City, Missouri. St. Louis University paid taxes to Kansas City on this business property on her one-half interest. Respondent did not. Then St. Louis University sold her interest to respondent and respondent now attempts to withdraw the entire tract from petitioner's tax rolls (R. pp. 151, 152).

We, therefore, respectfully urge this Court to grant the petition herein so that your petitioners will not be deprived of the right to have the important matters involved in this case adjudicated. We have not, in this argument, burdened the Court with the citation of numerous authorities, but have attempted only to present briefly the questions involved.

Respectfully submitted,

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